No. 337

IN THE

Supreme Court of the United States

October Term, 1944.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, LOCALS No. 15, 17, 107, 108 and 111, affiliated with the Congress of Industrial Organizations,

Petitioners,

against

EAGLE-PICHER MINING AND SMELTING COMPANY, a corporation, EAGLE-PICHER LEAD COMPANY, a corporation,

and

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, intervenors in the Court below (R. 185), pray that a writ of certiorari issue to review the decision and orders of the United States Circuit Court of Appeals for the Eighth Circuit (1) denying the motion of the National Labor Relations Board for judgment on its petition

to vacate portions of the back pay provisions of the decree and to remand and dismissing the petition, said decision and order being entered April 19, 1944, rehearing denied May 17, 1944, and (2) denying the motion of the Petitioners to modify the decree or to remand, said order also being entered on May 17, 1944.

The Petitioners also move that, should the writ issue, the decision and orders of the Court below be simultaneously reversed with directions either to modify, or vacate paragraphs 2 (d) and 3 (b) of the decree and remand to the Board so much of this cause as is affected by said paragraphs for further proceedings.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals denying the Board's motion for judgment on its petition to show cause, to vacate back pay provisions of the decree and to remand (R. 307-311) is reported in 141 F. (2d) 843. The memorandum opinion of the Court below granting the Board permission to file said petition to show cause, etc. (R. 281) is not reported. The order of the Court below denying the motion of the petitioners to modify the decree or to remand (R. 343) was made without opinion. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 25-180) are reported in 16 N.L.R.B. 727-882. The opinion of the Court below enforcing said findings of fact, conclusions of law, and order of the Board dated May 21, 1941 (R. 187-208), is reported in 119 F. (2d) 903.

JURISDICTION.

The decision and order of the Circuit Court of Appeals denying the Board's motion for judgment on its petition to vacate and to remand and dismissing its petition was entered on April 19, 1944 (R. 307-312), rehearing denied May 17, 1944 (R. 343). The order of the Court below denying the motion of the Petitioners to modify the decree, or to remand was entered May 17, 1944 (R. 343). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act (July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, et seq.) are set out in the Appendix.

QUESTIONS PRESENTED.

1. Does the authority of the National Labor Relations Board to make all findings of fact and to determine the means whereby the effects of prior unfair labor practices are to be expunged terminate with the entry of a decree enforcing its order, so that thereafter, when the Board determines from facts appearing for the first time during compliance negotiations that the unexecuted provisions of the decree must be modified in order to achieve the remedy intended, and so represents to the Court in a petition to vacate and remand, the Court may substitute its appraisal of the old and new evidence and of the effectiveness of the old decree for that of the Board?

2. In making its order for restitution of future wages likely to be lost during the discrimination period following the close of the hearing before the Board's trial examiner, the Board was forced to prognosticate the future employment situation and to base such back pay provisions upon hypothesis instead of proven fact. Did the Court below act improperly in refusing to modify or to vacate and remand such back pay provisions when the facts as they materialized differed from those hypothesized by the Board?

3. Does the existence of a mathematical mistake in the Board's formulation of the back pay remedy, embodied in the decree, warrant modification or remand of the back pay provisions of the decree so as to fulfill the Board's intent and purpose to "make whole" the 209 workmen concerned?

STATEMENT.

Upon the usual proceedings, the Board on October 27, 1939, issued its findings of fact, conclusions of law, and order (R. 25-180), which may be summarized as follows:

Several attempts during 1934 and early 1935 of the International Union, Petitioners herein, to bargain collectively with the Companies and other employers had ended in failure. On May 8, 1935, the International Union called a strike, closing virtually all mines, mills and smelters in the Tri-State District of Southwestern Missouri, Northeastern Oklahoma and Southeastern Kansas, including all operations of the Companies. (R. 39; 16 N.L.R.B. 741).

Operators and employees, mostly supervisory, soon started a back-to-work movement. A new organization was formed to "stamp out" the International Union. It was called the Tri-State Metal, Mine & Smelter Workers Union, and was later known as the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers. A mine operator, F. W. Evans, was president. The executive board consisted of mine foremen, superintendents, and managers. Its funds came from mining companies. The Eagle-Picher Companies, through George Potter, vice-president, made payments to the said Tri-State Union of $17,500, one of $2,500 on July 8, 1935, during the strike, and three days after the National Labor Relations Act came into force. (R. 40, 42, 49, 64-69, 73, 47, 50-51; 16 N.L.R.B. 742, 744, 751, 766-771, 775, 749, 752-753).

The Tri-State Union hired 75 to 100 men, some of them convicted felons, furnished them with weapons, and had them patrol the district in squad cars. They stopped International Union men, attacking, blackjacking, beating, kidnapping and "jailing" them. The president of the Treece local was shot. The International hall at Treece, Kansas, was wrecked in a demonstration organized by supervisors of the Companies. (R. 48, 60-61, 62, 63; 16 N.L.R.B. 750, 762-763, 764, 765).

The back-to-work movement succeeded and the Companies resumed operations on or about June 10, 1935, before the effective date of the Act, with the exception of the Galena smelter and the Big John mine, which did not reopen until July 16, 1935. (R. 93; 16 N.L.R.B. 795).

Representatives of the International Union after July 5, 1935, sought settlement of the strike and a return to work. Conferences with Vice-President Potter failed. A substantial number of claimants individually sought reemployment, but were refused. The claimants were at all times after July 5, 1935, willing to return to work in the absence of illegal conditions. (R. 110; 16 N.L.R.B. 812).

The Companies' consistent policy was to deny employment to active International Union members and to require membership in the Tri-State Union, even of their supervisory employees and all personal managers. All applicants for membership in the Tri-Sate had to be recommended either by their former employer or by some member of the executive board. This board was composed of supervisory employees of the Companies and other mine operators. The Companies used the Tri-State (later Blue-Card) Union as an employment agency, and by the policies of this Union excluded all workers suspected of sympathies for the International Union. (R. 51-55, 89-91, 98; 16 N.L.R.B. 733-757, 791-795, 800).

The Board found that the imposition of the illegal conditions of reinstatement constituted unfair labor practices and violated Section 8 (1) and (3) of the Act. (R. 165-166; 16 N.L.R.B. 867-868).

In fashioning a back pay remedy, the Board stated that its objective was to restore the situation as nearly as possible to that which would have obtained but for the illegal discrimination. The Board declared that it ordinarily ordered the offending employer to reinstate the employees discriminatorily refused reinstatement and to make them whole with back pay. In the instant case, the Board was faced with the Companies' defense that they could not take

back or reinstate the claimants because an insufficient number of jobs were available for them after July 5, 1935, the effective date of the Act (R. 132, 100-103, 29 (footnote 6), 18-21, 23, 6-9, 17; 16 N.L.R.B. 731 (footnote 6), 834, 802-805). In particular, the Companies made the following specific representations:

That the number of men essential to their operations after the strike was reduced (1) by more than 2/7ths due to invalidation of the N.R.A. (R. 10-11, 100-101, 186), (2) by sale and shutdown of some of its mines (R. 11, 12, 13, 14, 16, 186), (3) by changes in methods of operation (R. 14, 10, 12, 15, 16), (4) by elimination of specific jobs (R. 14, 15, 186); further, that they were taking back old employees predominantly, and that as former employees applied, most of the new men were eliminated in a short period of time (R. 17-18); that of the crew of men working after the strike, over 90 percent were on the pre-strike payrolls of May 8, 1935 (R. 9); that their properties were in normal operation prior to July 1, 1935 (R. 17-18). Finally, the Companies represented to the Board that as to each of the claimants "there is no evidence that said person's former employment or any employment with the respondents, or either of them, was available on or after July 5, 1935," and "ignores the evidence of respondents' requirements and availability of work" (R. 100-103, 132; 16 N.L.R.B. 802-805, 834; Exceptions to Intermediate Report Nos. 119, 120, 121, 122, 123, 124, R. 18-21).

These representations led the Board to the following conclusions:

> • • • had the respondents acted lawfully in restaffing their force, there is no certainty that all the claimants found to have been discriminated against would have returned to work since there were presumably at all times less jobs open than old employees available. It is certainly fair to assume, on the other hand, that a large number of claimants discriminated against would have returned. (R. 132; 16 N.L.R.B. 834).

The assumption that there were not enough jobs available for all claimants had as a consequence two difficulties. The first difficulty was that there was no way of determining which of the 209 claimants would have found reemployment, and, therefore, which of them should be granted back pay. The Board decided to overcome this difficulty by apportioning the presumptive total of earnings of so many of the claimants as would have obtained jobs after July 5, 1935, among all of the claimants as a group. The second difficulty was the computation of this total. To solve the second difficulty, the Board devised a formula. Under this formula it was assumed that of the total number of jobs opening at the Companies after July 5, 1935, a proportionate number would have gone to claimants, in the ratio of their number to that same number plus the number of all other old employees reapplying for jobs on and after July 5, 1935 (R. 132-134; 16 N.L.R.B. 834-836).[1]

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[1]The provisions of the Board's formula are as follows:

"A lump sum shall be computed, consisting of all wages, salaries and other earnings paid out by the respondents to all persons hired or reinstated from and after July 5, 1935, up to the date on which the respondents comply with our order reinstating or placing on a preferential list the claimants discriminated against.[185] The lump sum shall consist of all such monies so paid to such persons during the period set forth in the preceding sentence. For the reasons indicated above, we shall not credit the entire lump sum to the claimants discriminated against, since we cannot assume that they and only they would have been given these jobs had the respondents acted lawfully. But we can and do assume for this purpose that a proportionate amount of such claimants would have been given the jobs. In establishing the governing proportion, we shall divide the number of claimants discriminated against by that same number plus the number of other employees on the respondents' pay rolls of May 8, 1935, who applied for work with the respondents, whether successfully or not, after July 5, 1935. Let us assume for purposes of illustration that the lump sum amounts to

Both difficulties originate from the one fact assumed by the board that there were presumably at all times less jobs open than old employees available. The Board overcame both difficulties by the one means of devising its formula (R. 132-134, 317).

In the event of full employment available for all claimants, the normal remedy of full net back-pay was applicable and the formula unnecessary (R. 132; 16 N.L.R.B. 834). This was not expressly stated in the formula. But, by a Footnote 185, the Board intended to protect the Companies against paying more than the claimants as a group would have lost (R. 133). Footnote 185 provides:

> If at any given time during this period the number of such new or reinstated employees then working exceeds the number of claimants discriminated against, only the earnings of a number of such employees equal to the number of claimants discriminated against shall be counted in computing the lump sum. In such a case the respondents shall not select any particular new or reinstated employees for exclusion from the computation, but shall take the average earnings of all new or reinstated employees then working and multiply by the number of claimants discriminated against, to arrive at the total to be credited to the lump sum. (R. 133).

$360,000, that there are 200 claimants discriminated against, and there are 100 other employees on the May 8, 1935, pay roll who applied after July 5, 1935. Thus, we assume that two-thirds of the number of jobs would have gone to claimants discriminated against, had the respondents acted lawfully, as jobs were filled. This, we think, is as close as it is possible to come to reconstructing the probable situation, absent the respondents' discrimination. Still using the illustrative figures, two-thirds of the lump sum, or $240,000, would be the basic sum to be divided among the claimants discriminated against. This sum is then to be apportioned among the claimants discriminated against." (R. 133-134; 16 N.L.R.B. 835-836).

This footnote contains a mistake in its formulation: it directs that the claimants *and other old employees reapplying for jobs* share proportionately in the earnings from such jobs as would have gone to claimants *alone*, instead of to the claimants and such other old employees. As a result, in a situation of full available employment for all 209 claimants, the application of Footnote 185 would allow reimbursement to them of only a part or fraction of the wages they lost, contrary to the purposes the Board stated it sought to achieve by its order (R. 132, 334-336; 16 N.L.R.B. 834). However, in view of the Companies' representations as to the employment situation, the Board never envisioned a situation of full employment for all claimants (R. 132; 16 N.L.R.B. 834, Board's Petition for Rehearing, R. 319, 323).

Pursuant to its conclusions, the Board ordered the Companies, among other relief not here material, to offer the 209 claimants reinstatement or placement on a preferential hiring list, and to "make whole" these employees with back pay (R. 169, 171; 16 N.L.R.B. 871, 873). No specific amounts of back pay were fixed in the order. Paragraphs 2 (d) and 3 (b) of the order provide merely that the Companies—

> "Make whole all persons listed in Appendix A [and B] in the manner set forth above in the section entitled 'The Remedy', * * * " (R. 169, 171).

On June 27, 1941, the Court below decreed (R. 187-208) enforcement of the Board's order in its entirety (110 F. (2d) 903), with modifications requested by the Board not here material (R. 208, 210, 212).

On August 23, 1941, the Companies, pursuant to the order as now enforced, offered reinstatement to the claimants, thereby fixing August 23, 1941, as the terminal date of the 6-year period of discrimination which had begun July 5, 1935 (R. 224, 338).

The Board then requested the Companies to comply with the order to "make whole" the claimants, and to furnish the Board with the basis of their computations. The Companies made their computations available to the Board on or about May 1, 1942. They tendered the sum of $8,409.39 in purported full payment of all wages lost by the 209 employees during the 6-year discrimination period. Subsequently, the Companies asserted that no more than $5,400.00 was due (R. 224-225, 338).

The Board thereupon examined and analyzed the pay rolls and records of the Companies to verify the accuracy of the Companies' computations, as is its usual practice. However, these payrolls and records are not now and never have been made a part of the record in the court below. This examination and analysis was completed in October, 1942 (R. 225, 338). In the Board's own words, it "disclosed the fact, not heretofore made known, that despite any curtailment of employment, the Companies, in their operations conducted after July 5, 1935, and during the entire period up to and including August 23, 1941, were in a position to accord full employment at all times both to all reapplicants continuing to be available for work, and to all claimants." (R. 225, 301, 338).

The Companies' representation that jobs were not available to claimants after July 5, 1935 (R. 18-21, 100-103, 132), was false (R. 225, 268-280). The Companies' evidence that most of the new men were eliminated in a short period of time (R. 17-18) was untrue (R. 268-280).

In its petition for rule to show cause, to vacate and to remand filed February 1, 1943 (R. 215-230), which the Court below considered as a "petition in the nature of a bill of review" (R. 281), the Board averred that,

> * * * in the fulfillment of the statutory purpose of make whole each employee who had suffered wage deprivation in consequence of the Companies' unfair labor practices, the Companies properly should have

been required to reimburse fully each such employee. * * *

If ultimately put into effect, the remedy herein prescribed, however interpreted, would substantially shift the loss resulting from the Companies' unfair labor practices to the employees discriminated against and relieve the Companies of a major part of their obligation, measured by the actual facts, thereby frustrating the purposes of the Act, impairing the remedial operation of the administrative judicial process created thereby and injuring the important public rights intended to be safeguarded. (R. 226-227, 228).

The Board computed the full back pay lost, after deduction of net earnings elsewhere, to amount to approximately $800,000 (R. 227, 302-303, 339). The 209 workmen have not received any reimbursement for their lost wages, and the back pay provisions of the decree applicable to them remain unexecuted (R. 339-340, 311). Says the Board:

Apportionment among the claimants of the sum of $5,400, now claimed by the Companies to be all that they are required to pay under paragraphs 2 (d) and 3 (b) of the Decree, would be less than three-fourths of one-percent (.0075) of the loss the Companies had wilfully caused to the 209 claimants during the said 6-year period. (R. 228).

Such is the situation facing 209 employees discriminated against after more than 8 years of administrative judicial procedure. (The Petitioners filed charges March 25, 1936, *Lyons et al.* v. *Eagle-Picher Lead Co.* (C. C. A. 10) 90 F. (2d) 321.)

The Board's petition prays the Court below to vacate paragraphs 2 (d) and 3 (b) of its decree and to remand to the Board so much of this cause as is affected by said paragraphs for further proceedings consistent with the facts now for the first time appearing (R. 229).

The Companies' answer to the Board's petition (R. 283-290), although challenging its sufficiency, admitted the truth

of the newly discovered evidence, to-wit: that they had jobs on and after July 5, 1935, for all 209 claimants plus all other old employees available (R. 288, 295, 301, 305-306). The Board then moved for judgment on the pleadings and the record upon the ground that no genuine issue of fact existed (R. 293-304). The Court below denied the Board's motion for judgment (141 F. (2d) 843), and on April 19, 1944, dismissed the Board's petition (R. 307-311, 312). On May 17, 1944, the Court below denied the Board's petition for rehearing (R. 343).

On the same day, May 17, 1944, the Court below, having "considered" (R. 343) Petitioners' motion to modify or to remand the back pay provisions of the decree, denied the same without opinion (R. 343). The Court had previously granted Petitioners leave to file such motion (R. 326).

Petitioners' motion (R. 329-342) asks modification or remand of the back pay provisions of the decree (1) because the Board made a mistake in setting up its formula by leaving out of Footnote 185 an element (R. 341, 334-336), as pointed out above, (2) because the employment situation following the close of the hearing had turned out to be otherwise than as prognosticated or assumed by the Board (R. 340), and (3) because the Board's newly discovered evidence as outlined above, disclosed a factual situation for which it had made no provision (R. 337).

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that it was "not convinced that on account of any mistake of the Board perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved," and thus assuming original authority to determine what remedy will bring about fair administration of the Act.

2. In refusing to remand the back pay provisions of the decree and thereby assuming original jurisdiction over the fixing of the specific amounts of wages lost and back pay to be awarded.

3. In refusing to permit modification or remand of the back pay provisions for the discrimination period following the close of the hearing before the trial examiner so as to accord with the Board's intent as expressed in its order.

4. In refusing to correct or to permit the Board to correct its mistake in formulating Footnote 185.

5. In holding that the Board departed from its normal remedy for reasons other than its understanding as to the employment situation.

6. In holding that the Board intended to award partial back pay where full wages were lost by the entire group of claimants.

7. In holding that paragraphs 2 (d) and 3 (b) of the decree should not be modified, or vacated and remanded.

REASONS FOR GRANTING THE WRIT.

1. The Board and the Court below do not agree as to the basis, meaning or adequacy of the back pay order enforced by the decree in a newly discovered and established factual situation. Two principles of law which seem to be applicable are in conflict.

On the one hand, this Court has consistently ruled that "it is for the Board not the Courts to determine how the effects of prior unfair labor practices may be expunged." *International Association of Machinists* v. *N.L.R.B.*, 311 U. S. 72, 82; Section 10 of the Act.

On the other hand, the exclusive function of the Board to adopt such means as will adequately effectuate the policies of the Act, is subject to "limited review" by the Courts. *Phelps-Dodge Corp.* v. *N.L.R.B.*, 313 U. S. 177, 194. After "enforcement" of a Board order, "the Court would not be

bound to look upon the Board's construction as its own." *J. I. Case Co.* v. *N.L.R.B.*, 64 S. Ct. 576, 582. In the presence of the Court's continued and exclusive jurisdiction, the Board remains without authority to deal with its order. *Ford Motor Co.* v. *N.L.R.B.*, 305 U. S. 364.

The conflict between these two principles is sharply presented here because of the Board's discovery of new evidence after enforcement. There is no disagreement as to the facts established by the new evidence thus discovered. Such disagreement as exists is one which concerns the division of function between the Board and the Court below. After enforcement, is it for the Board or the Court below to evaluate primarily the effect of such newly discovered evidence? The United States Circuit Court of Appeals for the Fourth Circuit in *American Chain & Cable Co., Inc.* v. *Federal Trade Commission, infra*, has answered this question one way, the Court below has answered it the other way. Who is to prevail: the Board on the basis of the principle that in the exercise of its administrative function as an expert it should determine how the effects of prior unfair labor practices shall be expunged, or the Court below on the basis of the principle that the remedy after enforcement becomes its own? Here, too, the principles applied by the Circuit Court of Appeals for the Fourth Circuit and the Court below are in conflict.

Various aspects of this problem permeate the discussion that follows. No explicit answer can be found in the Act itself. This issue has not been, but should be, decided by this Court.

2. Even in the ordinary situation, uncomplicated by the discovery of new evidence, it has been held by the Second Circuit in *N.L.R.B.* v. *New York Merchandise Co.*, 134 F. (2d) 949, and by the Sixth Circuit in *N.L.R.B.* v. *Newberry Lumber & Chem. Co.*, 123 F. (2d) 831, that an order of the Board prescribing generally the method for determining back pay, as in the instant case, but not specifically fixing the amount thereof, is interlocutory, and remands to the Board were ordered for the purpose of making such specific

findings. It was assumed that after enforcement the Board continues to retain authority as an administrative agency. In the *New York Merchandise Company* case, Judge Learned Hand premised the Court's ruling on the following:

> At some stage of the proceeding the Board must therefore fix it (the back pay) as an original tribunal and not as the surrogate of the court.

and on the basis of this premise, the Court held:

> • • • until such hearing has been had and a decision rendered fixing the amount, the employer cannot be guilty of contempt, because it is cardinal in that subject that no one shall be punished for disobedience of an order which does not definitely prescribe what he is to do. (134 F. (2d) l. c. 952.)

Similarly, this Court in the *Phelps-Dodge Corporation* case remarked that back pay matters "should not be left for final settlement in contempt proceeding." A different view expressed by the Ninth Circuit in *N.L.R.B.* v. *Carlisle Lumber Co.*, 99 F. (2d) 533, adds to the confusion noted in the *New York Merchandise Company* case with "consequences", says Judge Hand, "which we think have not yet been fully realized."

Contrary to the foregoing decisions of the Second and Sixth Circuits, and in conflict with them, the Court below seems to hold that by its order of enforcement it had acquired and is retaining unlimited jurisdiction to fix ultimately the specific amounts of back pay. This is emphasized when the Court apparently applies common law rules relating to petitions in the nature of a bill of review to these proceedings (R. 281), which would invoke original and unlimited jurisdiction. But, a proceeding under the National Labor Relations Act is statutory, unknown to the common law (*N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48), and in fashioning an order, it is "wrong to fetter the Board's discretion by compelling it to observe conventional

common law or chancery principles." *Virginia Elec. & P. Co.* v. *N.L.R.B.*, 319 U. S. 533, 543.

The Court below, in so holding and by refusing to remand, left the Board no domain within which it might function as an agency for determining originally the specific amounts of back pay "in the light of its administrative experience and knowledge." *Virginia Elec. & Power Co.*, supra.

3. Particularly, where new evidence is discovered following the entry of an order, all former decisions seem to hold that a remand to the Board is necessary in the interest of a fair hearing and to permit the Board to function within the domain of its granted powers to find the facts, appraise their effects, and fashion a remedy. *Phelps Dodge Copr.*, supra; *N.L.R.B.* v. *Indiana & Michigan Elec. Co.*, 318 U. S. 9. This principle is as applicable after enforcement as before.

Directly in conflict with the decision of the Court below is the ruling of the Fourth Circuit in *American Chain & Cable Co., Inc.*, v. *Federal Trade Commission*, — F. (2d) —, decided May 29, 1944, not yet reported. The power of an administrative agency to modify an order after affirmance by a reviewing court was upheld, and the appraisal of all facts was left to the administrative agency, the Court saying:

> To hold otherwise would be to clothe the Circuit Courts of Appeals with the administrative power of the Commission in cases in which they have entered decrees of enforcement.

Compare, *Herzfeld et al.* v. *Federal Trade Commission* (C. C. A. 2) 140 F. (2d) 207, 209.

4. Irrespective of any other considerations, the back pay order enforced by the decree was subject to modification or remand for the discrimination period following the close of the hearing before the Board's trial examiner.

This hearing commenced on December 6, 1937, and ended on April 29, 1938 (R. 27). The findings, conclusions, and order of the Board were entered October 27, 1939 (R. 25). The Board found that the discrimination period began July 5, 1935, and since offers of reinstatement were made by the Companies on August 23, 1941 (R. 224), after "enforcement", the back pay period ends on that date. Therefore, the back pay order in part operated prospectively for a continuing period in the future—after April 29, 1938, to August 23, 1941. "In thus striving to restore the status quo, the Board was forced to use hypothesis and assumption instead of proven fact." *F. W. Woolworth Co.* v. *N.L.R.B.* (C. C. A. 2) 121 F. (2d) 658, 663.

The Board assumed that "at all times there were less jobs open than old employees available." (R. 132; 16 N.L.R.B. 834). This assumption turned out to be false (R. 225, 268-280), a fact not disputed (R. 288, 295, 301, 305-306). The remedy here prescribed in advance fails to achieve its purpose in the employment situation as it actually developed (R. 340, 227, 228, 303). Dealing with this special problem, the Second Circuit stated in the *Corning Glass Works* v. *N.L.R.B.*, 129 F. (2d) 967, l. c. 972:

> It is true that, in proper circumstances, the continuing nature of the back-pay order may call for adjustment because of new facts which have occurred after the conclusion of the Board's hearing which led to the entry by the Board of such an order.[5]

[5] Similar need for adjustment, because of changed circumstances, may arise in connection with an injunction decree (*United States* v. *Swift & Co.*, 286 U. S. 106, 114-115) or a decree for alimony (10 C. J. 273ff).

Recognizing the possibility of change, this Court in *Franks Bros.* v. *N.L.R.B.*, 64 S. Ct. 817, 819, stated:

> For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to

> new situations that may develop. * * * the Board may, in proper proceedings and upon a proper showing, take steps in recognition of changed situations * * *.

Here, also, the Board's order enforced by the decree at least in so far as it affects the back pay period following the close of the hearing, is prospective and based upon assumption and could not be intended to fix permanently the remedial relief of back pay for such period *without regard to the actual facts which might develop.* *N.L.R.B.* v. *New York Merchandise Co.*, supra; *N.L.R.B.* v. *Newberry Lumber & Chem. Co.*, supra; *Corning Glass Works* case, supra; *Phelps-Dodge Corp.* case, supra; *Indiana & Michigan Elec. Co.* case, supra. No Act of Congress could endow an administrative agency with such clairvoyant powers.

5. Faced with such newly discovered evidence, the Board took "steps in recognition of the changed situation" (*Frank's Bros.*, supra) and filed its petition to vacate the back pay provisions of the decree and remand them to the Board for reconsideration in the light of such new evidence (R. 215-230). The Board's petition was premised upon the ground that it had erroneously been led to believe that "there were presumably at all times less jobs open than old employees available" (R. 132; 16 N.L.R.B. 823) and that such assumption was the sole determining factor causing it to devise the lump-sum formula (R. 132).

On this point also the Board and the Court below disagreed. The reason the Board gives for invoking its formula finds substantial support in its decision which describes at great length what the objective is, how it is ordinarily achieved and how the peculiar factual situation here presents unusual difficulties (R. 132, et seq.; 16 N.L.R.B. 834, et seq.). However, the Court below holds that the Board shaped its remedy because of "many circumstances other than the uncertainty about the number of men required in the operations after July 5, 1935." (141 F. (2d) l. c. 844). No such other circumsfances are mentioned in the Board's

decision, none appear in the entire record, and the Court specifies none. All difficulties of the Board disappear when there are enough jobs available for all claimants after July 5, 1935.

We thus are confronted with the paradoxical situation that the Court below is telling the Board why it, the Board, did what it did, and refuses to accept the Board's prior explanations to the contrary, although these explanations, and only these, are supported by evidence. Since the Board is required to "disclose the basis of its order" (*Phelps-Dodge Corp.*, supra, 313 U. S. l. c. 197), its findings and inferences when supported by evidence should be as conclusive after enforcement as before. Section 10 (a), (c), (e) and (f).

This conflict between Board and Court has an important bearing on the question whether the formula is applicable in a newly discovered employment situation. The Board declares, as the wording of its decision indicates, and as it emphatically points out in its petition for rehearing, that its formula was never intended to be applied in a situation of full available employment for the claimants (R. 319, 323).

6. If applied to a situation of full available employment for all 209 claimants, the formula, by reason of Footnote 185, prevents the claimants from being made whole for their losses either individually or in the aggregate (R. 228). Thus, Footnote 185, a subordinate part of the formula, would prevent the restoration of the situation as nearly as possible to that which would have obtained but for the illegal discrimination, contrary to the intent of the Board as expressed in its decision (R. 132; 16 N.L.R.B. 834). As the Board, in its petition for remand, asserts,

> If ultimately put into effect, the remedy herein prescribed, however interpreted, would substantially shift the loss resulting from the Companies' unfair labor practices to the employees discriminated against and relieve the Companies of a major part of their obligation, measured by the actual facts, thereby frustrating

> the purposes of the Act, impairing the remedial operation of the administrative judicial process created thereby and injuring the important public rights intended to be safeguarded. (R. 228).

In Petitioners' motion to modify or to remand, we specifically analyze and demonstrate by examples that the footnote, in any event, contains a mistake in its formulation (R. 334-336; especially Par. 11, a, b, c).

This mistake of the Board may be characterized as inadvertent. Even when applied to an intermediate employment situation, i. e., where the number of new or reinstated employees exceeds the number of claimants, but is less than full employment for all claimants (R. 335, par. 11, c), the footnote brings about a result never intended by the Board. The right of the Board or the parties to modification, correction, or remand of orders of administrative agencies containing inadvertent mistakes or irregularities is essential to fair administration. *Ford Motor Co.* v. *N.L.R.B.*, 305 U. S. 364.

7. The Act assures employees immunity for conduct it makes lawful. This assurance can carry weight only if in every case it is followed by remedial action undoing fully the ill effects suffered by employees as a result of employers' unlawful conduct. Section 1; *Virginia Elec. & P. Co.*, supra; *Corning Glass Works*, supra; *Phelps-Dodge Corp.*, supra; *N.L.R.B.* v. *Waumbec Mills* (C. C. A. 1) 114 F. (2d) 226. These results the Board sought to achieve when it stated in its order,

> The objective is, of course, to restore the situation as nearly as possible to that which would have obtained but for the illegal discrimination. (R. 132; 16 N.L.R.B. 834).

Under the new evidence the Board has estimated that in the instant case the 209 workmen have lost approximately $800,000 in wages as a result of the Companies' discrimination (R. 227). In attempting to make restitution, however,

the Board was bound to consider its own order enforced by the decree. Not only were the back pay provisions it had set up based on erroneous assumptions, but the complicated formula, here designed and invoked for the first time (*Fifth Annual Report, N.L.R.B.*, p. 74), also contained hidden mistakes demonstrable only when applied to conditions as now established, mistakes enabling the Companies to compute $8,409.39 to be the back pay due (R. 225, 338). The Board and the parties aggrieved therefore appealed to the Court below for a remand.

The Court refused to remand. The Court disagreed with the Board's views and interpretations throughout. By claiming jurisdiction in a broad and summary manner, the Court below left no domain within which the administrative competence might function. Sec. 10 (a). The Board is left to apply a remedy which it has declared will not effectuate the policies of the Act.

And this is the situation which 209 workmen face after the protection of their rights has been held in abeyance during more than eight years of proceedings.

CONCLUSION.

It is respectfully submitted that for the reasons stated, the petition for writ of certiorari should be granted.

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APPENDIX.

1.

National Labor Relations Act.

(Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. v. Sec. 151, et seq.).

AN ACT To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Findings and Policy.

Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

RIGHTS OF EMPLOYEES.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be unfair labor practices for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * *

(3) By discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage membership in any labor organization: * * *

PREVENTION OF UNFAIR LABOR PRACTICES.

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, * * *

(b) * * * In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring that such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinable provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.